Compensation or Consideration for a Statutory Right of User?

Introduction

Section 180 of the *Property Law Act 1974* (Qld) makes provision for an applicant to seek a statutory right of user over a neighbour's property where such right of use is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land.

A key issue in an application under s 180 is compensation. Unfortunately, while s 180 expressly contemplates that an order for compensation will include provision for payment of compensation to the owner of servient land there are certain issues that are less clear. One of these is the basis for determination of the amount of compensation. In this regard, s 180(4)(a) provides that, in making an order for a statutory right of user, the court:

> (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just

The operation of this statutory provision was considered by de Jersey CJ (as he then was) in *Peulen v Agius* [2015] QSC 137.

Facts

Former owners of a predominantly landlocked property ('the property'), had constructed a formed driveway over a small corridor of the respondent's land ('the servient tenement') in order to connect the dwelling on the property to a local road. This driveway had apparently been constructed with the respondents' knowledge. This driveway was used as the primary means of access to the property. This informal arrangement continued for several years under a 'gentlemen's agreement' but was never made the subject of an enforceable right of user. When the property was sold to the applicants, the applicants were unaware that they had no enforceable right to use the section of the driveway that extended over the servient tenement. Inadequate searches by the applicants' legal representatives reinforced this misapprehension.

The applicants sought a right of access over the small corridor of the servient tenement in question. The applicants were willing to pay compensation for the statutory right of access and had offered $5,000 in exchange for the grant of an easement. The respondents resisted the application arguing, inter alia, that alternative access existed to the property. The respondents also argued that the right of user would impair the respondents' quiet use and enjoyment of their lot and that continuing use of the driveway for vehicular access would be inconsistent with the terms of a development approval that the respondents has obtained to reconfigure the servient tenement and would preclude any further reconfiguration. In the alternative, the respondents sought compensation and proposed that the compensation be measured, at least in part, by reference to the increased value of the property as a result of the imposition of the statutory right of access. The respondents' valuer estimated that the quantum of compensation payable was $33,000.

After careful consideration, de Jersey CJ reached the following conclusions in relation to the matters raised by the respondents:

- The imposition of a right of way would only occasion comparatively minor inconvenience to the respondents. This was evidenced by their failure to significantly object to the historical use of the same driveway by the former owners of the property. Any disruption of quiet enjoyment, privacy or utility could be adequately rectified by an award of monetary compensation;

- The cost of establishing the alternative access to the equivalent standard of the existing driveway was financially disproportionate to the value of the property and the burden of the easement on the servient tenement;

- Any depreciation in the market value of the servient tenement caused by the statutory grant of user would be relatively nominal and could be adequately rectified by monetary compensation;

- Given that there was expert evidence indicating a very low likelihood of approval for further subdivision of the servient tenement, only limited compensation was required to reflect any impediment to a potential future subdivision;

- In relation to the respondents' claim that the applicants would fail to obtain local council approval for the easement even if a statutory right of user were imposed, de Jersey CJ was satisfied, despite divergent expert evidence, that there was a 'real chance' that council approval would be forthcoming.

Given these findings, de Jersey CJ was satisfied that the imposition of a statutory right of user was reasonably necessary in the interests of effective use of the property in a reasonable manner. In contrast, the alternative urged by the respondents was inefficient, uneconomic and wasteful. Further, the imposition was consistent with the public interest.

This left the question of quantification of compensation for the respondents.

Compensation or Consideration?

The key issue to be determined was the meaning of the words 'compensation or consideration' in s 180(4)(a) of the *Property Law Act 1974* (Qld) and, in particular, the relevance of any benefit obtained or appreciation in value of the dominant tenement through the imposition of a right of user to the quantification of compensation or consideration payable. As noted by de Jersey CJ, New South Wales jurisprudence in relation to the operation of the largely equivalent statutory provision in New South Wales, s 88K of the *Conveyancing Act 1919* (NSW), indicates that 'compensation' is not a substitute for the price that could have been exacted if the statutory provision did not exist.

de Jersey CJ went on to note that in New South Wales the Supreme Court has not yet completely resolved the question of the relevance of any benefit or appreciation to the dominant tenement as a result of the statutory right of user in quantifying compensation. de Jersey CJ further noted that there is a division in existing Queensland case authorities on this issue.

In seeking to resolve this conflict, de Jersey considered it was significant that s 88K of the *Conveyancing Act 1919* (NSW) only refers to 'compensation' whereas s 180(4)(a) of the *Property Law*

Act 1974 (Qld) refers to 'compensation or consideration'. In this regard, de Jersey CJ opined (at [88] to [90]):

> A general rule of statutory interpretation is that all words in a statute must be given meaning and effect. The term "consideration" under the Queensland Property Law Act 1974 s 180(4)(a) justifies the court factoring any benefit of the dominant tenement into the quantification of any amount payable to the servient tenement owner. This is clearly distinguishable from the phraseology of s 88K of the Conveyancing Act in New South Wales and therefore supports a different interpretation. However, even in New South Wales, where the legislation merely refers to compensation, there remains debate surrounding whether the benefit to the dominant tenement is a significant factor in quantifying the compensation payable.
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> To interpret "consideration" to mean "consideration for loss or damage" would effectively render the use of the term otiose, as it would be substantially coextensive with "compensation". Accordingly, the better view is that the court may have regard to the benefit to the dominant tenement in quantifying the value of compensation to be awarded. This is far removed from any contention that the servient tenement should be entitled to hold the owner of the dominant tenement "to ransom" in negotiations by making unreasonable requests for compensation or consideration.
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> However, to say that the court may consider the benefit to the dominant tenement does not mean that it should. The calculation of compensation is unquestionably a discretionary decision of the court. Furthermore, consistently with the weight of jurisprudence in Queensland and New South Wales, the primary focus of any award under s 180(4)(a) should be compensation for loss damage or harm. Therefore, it would be uncommon for the court to determine the amount payable to the owner of the servient tenement by reference to the benefit to the owner of the dominant as a result of the imposition of the statutory right of user.

Applying this approach to the facts before him, de Jersey CJ did not consider this to be an appropriate case to measure the amount payable to the respondents by reference to the benefits obtained by the applicants. Only a nominal uplift was provided to reflect the benefit obtained by the applicants. In reaching this conclusion, de Jersey CJ noted that the applicants paid fair market value for the property in an arms' length transaction and that it would be unfair and unreasonable to reward the respondents for taking opportunistic advantage of the mistake made by the applicants' solicitors.

In the result, overall compensation was quantified at $2,500 which, as mentioned, included only a nominal uplift to reflect the benefit secured by the applicants through obtaining the statutory right of user.

Comment

The final result in this instance is not a surprising one. The real value of the decision lies in the discussion of the meaning of the statutory words 'compensation or consideration' given the division in previous authority. While the decision confirms that a court may consider the benefit to the dominant tenement, when assessing compensation to be paid under s 180 of the *Property Law Act 1974*, it also confirms that the discretion to award compensation on this basis is likely to be sparingly exercised. It remains the case that opportunism will seldom be rewarded.

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